

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST
FOR REVIEW BY:

JOHN E. SCHMIDT,
Petitioner.

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CHARGE NO.: 2009CA1420
EEOC NO.: 21BA90342
ALS NO.: 09-0723

ORDER

This matter coming before the Commission by a panel of three, Commissioners Marti Baricevic, Robert S. Enriquez, and Gregory Simoncini presiding, upon John E. Schmidt's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")¹ of Charge No. 2009CA1420; and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW, THEREFORE, it is hereby **ORDERED** that:

- (1) The Respondent's dismissal of the Petitioner's charge is **VACATED** in its entirety, and the charge in its entirety is **REINSTATED** and **REMANDED** to the Respondent for entry of finding of **SUBSTANTIAL EVIDENCE** on all Counts A- C, and for further proceedings in accordance with this Order and the Act.

In support of which determination the Commission states the following findings of fact and reasons:

1. On November 12, 2008, the Petitioner filed a charge of discrimination with the Respondent. The Petitioner alleged his employer, Dixon-Myers Transportation ("Employer"), discharged the Petitioner because of his age, 52 (Count A), his disability, knee disorder (Count B), and his arrest record (Count C), in violation of Sections 2-102(A) and 2-103(A), of the Illinois Human Rights Act (the "Act"). On December 3, 2009, the Respondent dismissed all counts of the Petitioner's charge for Lack of Substantial Evidence. On December 14, 2009, the Petitioner filed this timely Request.

¹ In a Request for Review Proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge requesting review of the Department's action shall be referred to as the "Petitioner."

2. The Employer is a motor coach company that transports passengers on long and short excursions. On February 9, 2008, the Employer hired the Petitioner as a coach driver.
3. In February 2008, the Petitioner's supervisor was "B.T." (hereinafter referred to as "the Supervisor").
4. In the course of the Respondent's investigation, the Petitioner stated that in February 2008, he had told the Supervisor about the Petitioner's disability.
5. On July 22, 2008, the Petitioner and the Supervisor became involved in a verbal altercation. At that time, according to the Petitioner, the Supervisor made various comments regarding the Petitioner being "too old." The Supervisor then told the Petitioner to hand over his keys, to get out and not to come back. The Petitioner assumed this meant he had been discharged by the Employer.
6. After the Petitioner had filed his charge with the Respondent, the Respondent attempted to contact the Supervisor by telephone on September 24, 2009; October 8, 2009; and on October 28, 2009, leaving voicemail messages on each occasion. The Supervisor never returned any of the Respondent's calls. Further, the Supervisor did not attend the fact-finding conference, even though the Respondent specifically requested that the Supervisor appear. Therefore, the Respondent was unable to obtain any information from the Supervisor regarding the events of July 22, 2008.
7. In his Request, the Petitioner argues that the Employer and its attorney made misrepresentations to the Respondent's investigator, and that the Respondent was biased in favor of the Employer.
8. In its response, the Respondent asks the Commission to sustain its dismissal of Count B because the Respondent determined there was no substantial evidence the Employer was ever made aware of the Petitioner's disability prior to July 22, 2008, when the Petitioner was allegedly discharged. The Respondent argues that proof that the Employer had knowledge of

the Petitioner's disability prior to taking the adverse action was an element of the Petitioner's *prima facie* case.

9. However, the Respondent asks the Commission to vacate its dismissal of Count A and Count C of the charge and make a finding of substantial evidence as to Counts A & C. The Respondent argues a finding of substantial evidence as to Counts A & C is warranted because the Supervisor failed to participate in the Respondent's investigation, and failed to provide any information regarding the Petitioner's allegations relative to those counts. From the Supervisor's failure to cooperate with the Respondent's investigation, the Respondent infers that any evidence the Supervisor would have provided would have been favorable to the Petitioner. Therefore, the Respondent argues a finding of substantial evidence is warranted because the Supervisor's failure to participate in the proceedings leaves the Respondent with conflicting evidence as to Counts A & C, which conflict must be resolved by a trier of fact.

Conclusion

The Commission has determined that the Respondent's dismissal of the Petitioner's charge shall be vacated in its entirety, Counts A - C, and the entire charge shall be remanded to the Respondent for further investigation.

As to Counts A & C, the Supervisor was the individual alleged to have engaged in discriminatory action. Thus it was vital that the Supervisor cooperate in the Respondent's investigation of the Petitioner's charge. The Supervisor's apparent failure to cooperate with the Respondent's investigation leaves the Commission with little choice but to infer that any testimony provided by the Supervisor would not have been favorable to him or the Employer. Therefore, the Commission agrees with the Respondent that it is appropriate to vacate the dismissal of Counts A & C. Counts A & C will be remanded to the Respondent and it shall enter a finding of substantial evidence.

As to Count B, the Commission finds there is no evidentiary support for the Respondent's determination that the Employer was unaware of the Petitioner's alleged disability prior to July 22, 2008. In fact, the Petitioner provided evidence that the Petitioner had disclosed his disability to the

Supervisor in February 2008. Therefore, there is evidence that the decision-maker, in this case the Supervisor, had knowledge of the Petitioner's disability prior to July 22, 2008, when the Petitioner was allegedly told by the Supervisor to get out and not to come back.

While knowledge of the disability alone does not prove the Supervisor acted with discriminatory intent, due to the Supervisor's failure to cooperate with the Respondent's investigation, the Commission infers that any evidence the Supervisor would have provided regarding the Petitioner's disability discrimination allegations would not have been favorable to the Supervisor or the Employer. Therefore, for the same reason that it is appropriate to vacate the Respondent's dismissal of Counts A & C, it is appropriate to vacate the dismissal of Count B so that all factual disputes relative to Count B may be resolved by a trier of fact. Count B shall also be remanded to the Respondent and the Respondent shall enter a finding of substantial evidence as to Count B.

THEREFORE, IT IS HEREBY ORDERED THAT

- (1) The Respondent's dismissal of the Petitioner's charge is **VACATED** in its entirety, and the charge in its entirety is **REINSTATED** and **REMANDED** to the Respondent for entry of finding of **SUBSTANTIAL EVIDENCE** as to all Counts A-C, and for further proceedings in accordance with this Order and the Act.

This Order is not yet final and appealable.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

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Entered this 23rd day of June 2010.

Commissioner Marti Baricevic

Commissioner Robert S. Enriquez

Commissioner Gregory Simoncini